Retro Environmental, Inc./Green JobWorks, LLC *and* Construction and Master Laborers' Local 11, a/w Laborers' International Union of North America (LIUNA). Case 05–CA–195809

September 21, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

This is a refusal-to-bargain case in which the Respondents are contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on March 27, 2017, by Construction and Master Laborers' Local 11, a/w Laborers' International Union of North America (LIUNA) (the Union), the General Counsel issued the complaint on May 24, 2017, alleging that Retro Environmental, Inc. (Retro) and Green JobWorks, LLC (GJW) (collectively, the Respondents) have violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 05–RC–153468.[1] (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) Retro and GJW each filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On June 12, 2017, the General Counsel filed a Motion for Summary Judgment. On June 15, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Retro filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondents admit their refusal to bargain, but contest the validity of the Union's certification of representative on the basis of their contentions, raised and rejected in the underlying representation proceeding, that they are not "joint employers" of the unit employees under the Act and that the unit is not an appropriate unit.[2]

All representation issues raised by the Respondents were or could have been litigated in the prior representation proceeding. The Respondents do not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor do they allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondents have not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.[3]

On the entire record, the Board makes the following

[1] On August 16, 2016, the Board (then-Chairman Pearce and then-Member Hirozawa; then-Member Miscimarra dissenting) found that the Respondents are joint employers of the employees in the petitioned-for unit and, contrary to the Regional Director, that the Respondents failed to meet their burden of proving an imminent cessation of operations. 364 NLRB No. 70, slip op. at 1. Therefore, the Board reinstated the petition and remanded the case to the Regional Director for further appropriate action. Id.

[2] In addition, one or both of the Respondents assert as affirmative defenses, inter alia, that the complaint fails to state a claim upon which relief can be granted, the complaint allegations are insufficient to state a violation of the Act, the complaint was issued without sufficient justification, the complaint allegations fall outside the scope of the underlying charges, and the complaint is vague and lacking in detail. The Respondents have not offered any explanation or evidence to support these bare assertions. Thus, we find that these affirmative defenses are insufficient to warrant denial of the General Counsel's Motion for Summary Judgment in this proceeding. Accordingly, we find it unnecessary to pass on the General Counsel's request that we strike the Respondents' affirmative defenses.

Retro also asserts as an affirmative defense that some or all of the complaint allegations are barred by Sec. 10(b) of the Act. However, Retro's answer admits the complaint allegations that the charge was filed on March 30, 2017, and that it has refused to bargain with the Union since March 1, 2017. Therefore, we find that Retro's 10(b) defense is without merit.

Finally, Retro asserts as an affirmative defense that it did not purposefully fail or refuse to bargain with the Union. However, Retro admits par. 6(b) of the complaint, which alleges that Retro has failed and refused to bargain with the Union since about March 1, 2017. We find that this affirmative defense does not raise an issue of fact warranting a hearing.

[3] GJW's request that the complaint be dismissed is therefore denied.

Chairman Miscimarra dissented from the Board's Decision on Review and Order in the underlying representation proceeding. He would have affirmed the Regional Director's dismissal of the petition based on imminent cessation of operations, as the record established that the alleged joint-employer projects at which the petitioned-for unit employees worked would end in mid-July 2015 and there was no evidence that Retro and GJW would work together on any future projects. *Retro Environmental, Inc./Green JobWorks, LLC*, 364 NLRB No. 70, slip op. at 5 (2016) (Member Miscimarra, dissenting). He therefore found it unnecessary to pass on the joint-employer issue, but stated that "any determination of Retro's and Green JobWorks' joint-employer status on any possible future projects they might work on would depend on the specific facts and circumstances of those jobs (if any) and cannot be determined in advance." Id., slip op. at 6 fn. 1 (Member Miscimarra, dissenting). While he remains of that view, Chairman Miscimarra agrees that the Respondents have not presented any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

FINDINGS OF FACT

I. JURISDICTION

At all material times, Retro has been a corporation with an office and place of business in Sykesville, Maryland, and has been engaged in the business of providing demolition and environmental services to private and governmental entities, including at sites in Washington, D.C.

At all material times, GJW has been a limited liability corporation with an office and place of business in Baltimore, Maryland, and has been a temporary staffing agency engaged in the business of demolition and environmental remediation, including asbestos remediation.

From about May 1, 2013, through May 1, 2014, Retro and GJW were parties to a contract which provided that GJW was the agent for Retro in connection with hiring employees for its projects located in Washington, D.C., Maryland, and Virginia.

Since about May 1, 2014, Retro and GJW have continued to operate consistent with the contract described above.[4]

At all material times, Retro has possessed control over the labor relations policy of GJW, exercised control over the labor relations policy of GJW, and administered a common labor policy with GJW for the employees of the Respondents.[5]

At all material times, Retro and GJW have been joint employers of the employees of the Respondents.

In conducting its operations during the 12-month period ending April 30, 2017, Retro performed services valued in excess of $50,000 in States other than the State of Maryland.

In conducting its operations during the 12-month period ending April 30, 2017, GJW performed services valued in excess of $50,000 in States other than the State of Maryland.

We find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[4] Although the Respondents deny this allegation, the Board found in the underlying representation proceeding that "[f]rom May 2013 to May 2014, Green JobWorks and Retro operated under a lease of services agreement. Although that agreement has expired, the two companies continue to operate essentially in the same manner, described below." 364 NLRB No. 70, slip op. at 1. Accordingly, we find that the Respondents' denials do not raise an issue of fact warranting a hearing with respect to this complaint allegation.

[5] The Respondents deny this allegation and the allegation that they are joint employers. As noted above, the Board addressed the joint employer issue in the underlying representation proceeding.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the mail-ballot representation election held from September 30, 2016, to October 21, 2016, the Union was certified on December 2, 2016, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time laborers, including demolition and asbestos workers, jointly employed by Retro Environmental, Inc. and Green JobWorks, LLC, excluding office clericals, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter and email dated March 1, 2017, the Union requested that the Respondents recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. Since that date, Retro has failed and refused to bargain with the Union. Since about March 3, 2017, GJW has failed and refused to bargain with the Union.

We find that the Respondents' conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since March 1 and 3, 2017, respectively, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, Retro and GJW have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act, we shall order them to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondents begin to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57

(10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondents, Retro Environmental, Inc., Sykesville, Maryland, and Green JobWorks, LLC, Baltimore, Maryland, joint employers, and their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Construction and Master Laborers' Local 11, a/w Laborers' International Union of North America (LIUNA) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time laborers, including demolition and asbestos workers, jointly employed by Retro Environmental, Inc., and Green JobWorks, LLC, excluding office clericals, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at their facilities in Sykesville, Maryland, and Baltimore, Maryland, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees jointly employed by the Respondents at any time since March 1, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. September 21, 2017

_____

Philip A. Miscimarra, Chairman

_____

Mark Gaston Pearce, Member

_____

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Construction and Master Laborers' Local 11, a/w Laborers' International Union of North America (LIUNA) (the Union) as the exclusive collective-

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

> All full-time and regular part-time laborers, including demolition and asbestos workers, jointly employed by Retro Environmental, Inc. and Green JobWorks, LLC, excluding office clericals, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

RETRO ENVIRONMENTAL, INC./GREEN JOBWORKS, LLC

The Board's decision can be found at www.nlrb.gov/case/05-CA-195809 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.